**PP**

**v.**

**NORFAIZAL MAT (NO 2)**

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL TRIAL NO: MT1-45-1-2002]
18 DECEMBER 2007

***EVIDENCE:*** *Admissibility - Statements - Statement given by person whose attendance cannot be procured - Failure to show diligent and exertive attempts to procure attendance of witness - Whether statement would be admissible under s. 32(1)(i) Evidence Act 1950 - Criminal Procedure Code, s. 112(1)*

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Trafficking in dangerous drugs - Allegation of - Whether presumption under s. 37(da) could be invoked - Whether charge should be altered from one of trafficking to one of possession - Criminal Procedure Code, s. 158(1)*

***CRIMINAL PROCEDURE:*** *Sentence - Mitigating factors - Considerations - Proper sentence to be meted out*

The charge, as amended, alleged that on 6 February 2002, at about 5.30pm in the compound of the Petronas station Ayer Keroh Melaka ('the Petronas station'), the accused was found to be trafficking in dangerous drugs, to wit, cannabis weighing 1036.9gm thereby committing an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s. 39B(2) of the same Act ('the charge'). Both the accused and one Azril had originally been charged with the same offence under s. 39B, but the charge against Azril was subsequently withdrawn. Azril was to appear as a prosecution witness but was missing. Attempts by the investigating officer (SP8) to trace him had proved futile. The deputy public prosecutor relied on s. 32(1)(i) of the Evidence Act 1950 to adduce as evidence the statement ('ID26') given by Azril to the police under s. 112(1) of the Criminal Procedure Code. The defence counsel objected on the ground that the prosecution had not complied with the conditions in s. 32(1)(i) and so the court should exclude ID26. The issues that also arose were (a) whether the presumption of trafficking under s. 37(da) relied upon by the prosecution could be invoked and (b) the appropriate sentence to be passed by the court.

**Held:**

**(1)** It was necessary for the prosecution and the police to make diligent search and reasonable exertion in order to procure Azril, otherwise the court is unable to come to a finding that Azril could not be found, in which case, his statement would be inadmissible under s. 32(1)(i) of the Evidence Act 1950. Mere ignorance of the whereabouts of Azril was not sufficient to invoke the section. The efforts expended by the prosecution and the police herein were somewhat lackadaisical and lackluster. Where the proceedings concern a capital charge warranting mandatory death sentence upon conviction, the court was reasonably entitled to expect more strenuous efforts of greater tenacity. In the circumstances, ID26 could not be admitted as evidence. (paras 13, 18 & 19)

**(2)** In view of the presumption invoked under s. 37(d) of the Dangerous Drugs Act 1952 pertaining to possession and knowledge, the presumption of trafficking under s. 37(da) relied upon by the prosecution could not be invoked. In line with s. 158(1) of the Criminal Procedure Code and in the interest of justice, the charge should be altered from one of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s. 39B(2) of the Dangerous Drugs Act 1952, to one of possession under s. 6 punishable under s. 39A(2) of the Dangerous Drugs Act 1952. (paras 37 & 40)

**(3)** In meting out the proper sentence, certain considerations were taken into account *ie,* the accused as a first offender, his guilty plea, his age, his public interest and the deterrent effect of the sentence. The maximum term of imprisonment under s. 39A(2) is 20 years and a minimum of 10 strokes of whipping. In the circumstances, a sentence of 10 years imprisonment on the accused was imposed, with effect from the date of arrest *ie*, 6 February 2002 and the minimum of 10 strokes of whipping. (para 45)

*[Order accordingly.]*

**Case(s) referred to:**

*Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC* ***(refd)***

*Kee Lik Tian v. PP [1983] 1 LNS 55 HC* ***(refd)***

*Leong Hoong Khie v. PP & Another Case [1986] 2 CLJ 291; [1986] CLJ (Rep) 179 FC* ***(refd)***

*Muhammed Hassan v. PP [1998] 2 CLJ 170 FC* ***(refd)***
*PP v. Chow Kam Meng [2001] 7 CLJ 387 HC* ***(refd)***
*PP v. Gan Kwong [1997] 2 CLJ Supp 433 HC* ***(refd)***
*PP v. James Tan [1983] 1 LNS 24 HC* ***(refd)***
*PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC* ***(refd)***
*PP v. Mogan Ayavoo [2004] 3 CLJ 623 HC* ***(refd)***
*PP v. Mohamad Fairus Omar [1997] 3 CLJ Supp 260 HC* ***(refd)***
*PP v. Mohd Jamil Yahya & Anor [1994] 1 CLJ 200 HC* ***(refd)***
*PP v. Norfaizal [2003] 8 CLJ 581 HC* ***(refd)***
*PP v. Oh Keng Seng [1978] 1 LNS 160 HC* ***(refd)***
*Wong Thin Yit v. Mohamed Ali [1971] 1 LNS 151 FC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 112(1), 158(1), (2), 159
Dangerous Drugs Act 1952, ss. 2, 6, 37A(1)(b), 37(d), (da)(vi), 39A(2), 39B(1)(a), 39B(2)
Evidence Act 1950, ss. 27; 32(1)(i)

*For the accused - Markhan Singh; M/s Mohd Latip & Assoc*
*For the prosecution - Abdul Rashid Daud DPP*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Low Hop Bing J:**

### The Charge

**[1]** The charge, as amended, alleges that on 6 February 2002, at about 5.30pm in the compound of the Petronas station Ayer Keroh Melaka ("the Petronas station"), in the district of Melaka Tengah, in the state of Melaka, the accused was found to be trafficking in dangerous drug, to wit, cannabis weighing 1036.9gm and that the accused had thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s. 39B(2) of the same Act ("the charge").

**[2]** For brevity and convenience, a reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952 unless the context otherwise requires.

### Missing Witness

**[3]** Both the accused and one Azril had originally been charged with the same offence under s. 39B, but the charge against Azril was subsequently withdrawn. Azril was to appear as a prosecution witness. However, Azril is now missing. Attempts by the investigating

officer (SP8) to trace him on 19 June 2003 and 23 July 2003 had proved futile. A final attempt to trace Azril in Kg Pantai Dalam Kuala Lumpur on 8 April 2003 was also unsuccessful. SP8 could not remember the dates on which efforts to trace him were published in the newspapers.

**[4]** SP8 states that on 19 June 2003, he caused a subpoena to be served on Azril but it could not be served by the process server. This process server was not called as a witness and his investigation diary was not produced as evidence.

**[5]** Another attempt to serve the subpoena was made on 8 April 2003 between 2 and 4pm by SP8 together with detective lance corporal 113950, but SP8 could not give Azril's address. The detective lance corporal was also not called as a witness. An advertisement allegedly inserted in a newspaper was not identified by any of the prosecution witnesses.

**[6]** Learned deputy public prosecutor Miss Faradziah bt Kasah relied on s. 32(1)(i) of the Evidence Act 1950 ("s. 32(1)(i)") and *Public Prosecutor v. Gan Kwong* [1997] 2 CLJ Supp 433 to adduce as evidence the statement ("ID26") given by Azril to the police under s. 112(1) of the Criminal Procedure Code ("s. 112(1)").

**[7]** Mr. Markhan Singh, learned defence counsel objected on the ground that the prosecution had not complied with the conditions in s. 32(1)(i) and so the court should exclude ID26, citing *PP v. Mogan Ayavoo* [2004] 3 CLJ 623 HC; *Public Prosecutor v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747 HC; and *Public Prosecutor v. Mohd Jamil b. Yahya & Anor* [1994] 1 CLJ 200 HC.

**[8]** I shall now examine the relevant portion of s. 32(1)(i) which reads as follows:

> **32. Cases in which statement of relevant fact by person who … cannot be found etc. is relevant**
>
> (1) Statements, written or verbal, of relevant facts made by a person who … cannot be found … or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (a) …
>
> (b) …
>
> (c) …

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law;

**[9]** The general rule of evidence requires the best evidence to be adduced. To this general rule, s. 32 is an exception which permits the admissibility of hearsay as evidence: see *Public Prosecutor v. Mohamad Fairus Omar* [1997] 3 CLJ Supp 260 HC; *Leong Hoong Khie v. PP & Another Case* [1986] 2 CLJ 291; [1986] CLJ (Rep) 179 FC; *Wong Thin Yit v. Mohamed Ali* [1971] 1 LNS 151, 180 FC; and *Kee Lik Tian v. Public Prosecutor* [1983] 1 LNS 55 HC.

**[10]** In my judgment, under s. 32(1)(i), it is incumbent upon the prosecution to prove that Azril has made a statement in the course of an investigation or inquiry into an offence under or by virtue of any written law; and

(a) he could not be found; or

(b) his attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable.

**[11]** Section 112(1) empowers a police officer making an investigation to examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

**[12]** The statement made by Azril to SP8 under s. 112(1) comes within s. 32(1)(i) and so is a relevant fact.

**[13]** It is necessary for the prosecution and the police to make diligent search and reasonable exertion in order to procure Azril, otherwise the court is unable to come to a finding that Azril could not be found, in which case, his statement is inadmissible under

s. 32(1)(i). Mere ignorance of the whereabouts of Azril is not sufficient to invoke the section: see *Lam Peng Hoa & Anor, supra,* per Kang Hwee Gee J.

**[14]** Alternatively, there must be evidence that Azril cannot be procured as a witness without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable.

**[15]** In *Mogan Ayavoo, supra,* the prosecution sought to invoke s. 32(1)(i). Attempts by the police to find the missing witness through advertisements in the newspapers, sending out signals to all the police district chiefs in East and West Malaysia and tracing all known addresses of the witness were futile. Balia Yusof Wahi JC (now J) rejected the prosecution's application to admit the witness' statement under s. 112 because the attempts made by the police were nothing more than sticking to their own routine procedure; and the failure of the police to locate any member of the witness' family and to interview them as well as the failure to check the witness' Sabah address clearly indicated the lack of initiative and diligence on their part.

**[16]** More serious effort is warranted: see *PP v. Chow Kam Meng* [2001] 7 CLJ 387, 398 per Abdul Wahab Patail J.

**[17]** In *Gan Kwong, supra,* where the police had arrested one C together with the accused. C was not charged in court but was offered bail. Police could neither trace nor serve a subpoena on C who had earlier given a statememt under s. 112 to the police. Several attempts were made to trace not only C but also C's surety. The investigation diaries of two lance corporals were tendered as exhibits to show the efforts to serve the subpoena on C and his surety. A third lance corporal tried to obtain the addresses of C and his witness from various Government departments but the efforts were unsuccessful. A fourth lance corporal also attempted to serve the subpoena on the surety. Three advertisements were inserted in three separate Chinese dailies and their translations were exhibited. The bail bond was also tendered as evidence. The meticulous and strenuous efforts exerted by the police had impressed Abdul Malik Ishak J who allowed the prosecution to tender C's s. 112 statement under s. 32(1)(i) and admitted it as evidence.

**[18]** However, the efforts expended by the prosecution and the police in the instant case were, with due respect, somewhat lackadaisical and lacklustre, falling even below the steps taken by their counterparts in *Mogan Ayavoo, supra.* Where the proceedings concern a capital charge warranting mandatory death sentence upon conviction, the court is reasonably entitled to expect more strenuous efforts of greater tenacity.

**[19]** In the circumstances, I am unable to admit ID26 as evidence.

**Ingredients Of The Charge**

**[20]** In order to establish a *prima facie* case of the charge, it is incumbent upon the prosecution to prove that:

(1) The substance in question is cannabis;

(2) The weight is 1036.9gm; and

(3) The accused was trafficking in cannabis, either by way of direct evidence or invoking the relevant statutory presumption.

**Substance And Weight**

**[21]** The unchallenged evidence of the chemist Mr. Lim Kieng Chwee (SP3) confirmed that the substance analysed by him was cannabis as defined under s. 2 and that the weight was 1036.9gm.

**Possession And Trafficking**

**[22]** These ingredients require a more elaborate treatment and warrant a maximum evaluation of the evidence adduced for the prosecution. My finding of facts will now follow.

**[23]** On 6 February 2002 at 4.30pm, chief inspector Mustafa Kamal (SP4) led two other officers and ten men to the Petronas station. At about 5.30pm, at a stall there, SP4 together with chief inspector (later ASP) Fauzi (SP5), chief inspector Mat Yatim (SP6) and detective lance corporal Chandrasekaran approached two male Malays. SP4 examined one of them, identified as Azril, but found nothing on him. The other male Malay, identified as the accused, attempted to flee. After a commotion, SP4 and his men arrested both of them.

**[24]** SP5 saw the accused holding a car key in his right hand. The accused then led SP4, SP5, SP6 and other members of SP4's police party to the accused's Proton Wira car bearing "registration No. WDR 6039" with chassis No. PLIC 96 SNRYB461190 ("the Proton car") which was parked about ten metres from the stall there. The Proton car was locked. The accused used the car key to open the door to the driver's seat. Subsequently, the accused opened the door behind the driver's seat and entered the car through that door. He then lifted the seat on the left, behind the front passenger's seat. In the presence of SP4 and the police party, the accused took out a black plastic package with the words "Thank you for your business" (exh. P12).

**[25]** SP4 then administered the caution under s. 37A(1)(b) of the Dangerous Drugs Act 1952, and recorded a statement from the accused.

**[26]** At this juncture, there was an application by the defence for a *voire dire* (trial within a trial) to determine the admissibility of the cautioned statement (ID15) given by the accused to SP4. Thereafter, I held that the statement was inadmissible (see *Pendakwa Raya v. Norfaizal* [2003] 8 CLJ 581).

**[27]** Reverting to the trial proper, SP4 opened exh. P12 in the presence of *inter alia* the accused, and found a parcel containing compressed substance wrapped in aluminium paper and tied with a string. SP4 suspected the compressed substance to be cannabis. SP4 informed the accused, *inter alia*, of the offence of drug trafficking, and brought him to the Proton car, driven by detective lance corporal Yahya and escorted by detective lance corporal Chandrasekaran. SP4, who seized the compressed substance, took the front passenger's seat. All of them proceeded to SP4's office in the police contingent headquarters.

**[28]** SP4 issued a search list to the accused who countersigned it. The list itemised:

(1) the compressed substance;

(2) exhibit P12;

(3) the car; and

(4) the car key.

**[29]** On the same day, at 7pm, SP4 informed SP8 of the same. When SP8 arrived at SP4's office at about 7.45pm, SP4 handed over to SP8 the items contained in the search list.

**[30]** Cross-examination of SP4 by the defence created no adverse effect on his evidence-in-chief.

**[31]** SP5 and SP6 who were with SP4 in the police party on 6 February 2002 corroborated SP4's evidence. The defence cross-examination had also not created any adverse effect in their respective evidence-in-chief.

**[32]** SP7 was at the material time the owner of a Sedan 3.1 Proton Wira car bearing registration number WHN 5939 ("the Proton Wira car") and the same chassis number as the Proton car. SP7's car was reported missing at Klang Jaya Jusco on 26 November 2001. He did not lend his car to anybody. He lodged a report at Klang police station. He was subsequently informed by SP8 that the Proton Wira car bearing the same chassis number has been found and that the Proton car was confirmed by SP8 as the Proton Wira car.

**[33]** For the purpose of proving possession and trafficking, the prosecution relied on the evidence of SP4 to SP6 and the presumption of trafficking under s. 37(da)(vi).

**[34]** In my judgment, the issue of whether the accused was in possession of the drug in question must be established by reference to the evidence adduced at the trial. There are limitless permutations of facts and circumstances available in each particular case.

**[35]** As the accused was found to have custody or control of exh. P12, I apply the presumption under s. 37(d) which says that "any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug."

**[36]** Under s. 37(d), the accused is deemed to have been in possession, and to have known the nature of the drug ie, cannabis.

**[37]** In view of the presumption invoked under s. 37(d) pertaining to possession and knowledge, the presumption of trafficking under s. 37(da) relied upon by the prosecution cannot be invoked. This has been clearly stated by the then Supreme Court in *Muhammed Hassan v. PP* [1998] 2 CLJ 170.

**[38]** That being the case, in all humility, at the close of the prosecution's case, I should have held that there was a *prima facie* case of possession, instead of accepting the submission of the prosecution to the effect that s. 37(da) could be invoked directly, without referring to s. 37(d). I should have ordered the accused to answer a *prima facie* case of possession.

**[39]** Section 158(1) of the Criminal Procedure Code ("s. 158(1)") provides *inter alia* that any court may alter any charge at any time before judgment is pronounced: see *Public Prosecutor v. Oh Keng Seng* [1978] 1 LNS 160 HC per Ajaib Singh J (later SCJ); and *Public Prosecutor v. James Tan* [1983] 1 LNS 24 per Charles Ho J (as he then was).

**[40]** Hence, in line with s. 158(1) and in the interest of justice, I alter the charge from one of trafficking under s. 39B(1)(a) punishable under s. 39B(2), to one of possession under s. 6 punishable under s. 39A(2).

**[41]** Pursuant to s. 158(2), as further explained by the Supreme Court through the judgment of Syed Agil Barakbah SCJ (as he then was) in *Hee Nyuk Fook v. Public Prosecutor* [1988] 1 LNS 15, I now cause the alteration to be read and explained to the accused and ask him to plead thereto under s. 159.

**[42]** The accused has pleaded guilty to the charge as altered. He understood the nature and consequences of his plea. I then explained to the accused that the facts are as found in the evidence adduced, to which he has admitted. Upon accepting his plea, I convicted him on the charge as altered.

**[43]** In mitigation, learned defence counsel said that the accused was 22 years on the date of the incident. He is a first offender who had pleaded guilty at the first opportunity and so prayed for leniency.

**[44]** The learned deputy public prosecutor urged the court to pass an appropriate sentence as the offence is serious.

**[45]** In meting out the proper sentence, I have considered the accused as a first offender, his guilty plea, his age, public interest and the deterrent effect of the sentence. The maximum term of imprisonment under s. 39A(2) is 20 years and a minimum of ten strokes of whipping. In the circumstances, I impose a sentence of ten years imprisonment on the accused, with effect from the date of arrest ie, 6 February 2002, and the minimum of ten strokes of whipping.